

APPEAL NO. 021243
FILED JULY 9, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 20, 2002, and was continued and concluded on April 22, 2002. The hearing officer determined that the respondent's (claimant) average weekly wage (AWW) is \$815.03. The appellant (carrier) appealed arguing that the hearing officer erred in determining AWW. The file does not contain a response from the claimant.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant's AWW is \$815.03. The claimant testified that he worked as an aircraft mechanic and was paid \$7.00 per hour, that included a per diem at \$12 per hour or \$480 maximum per week. The carrier contends that the claimant's per diem should not be included in calculating the AWW. Section 408.041(a) provides that a full-time employee's AWW shall be determined by dividing the sum of the wages from the 13 weeks preceding the compensable injury by 13. See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(d) (Rule 128.3(d)). If a full-time employee did not work for the employer for the 13 weeks preceding the compensable injury, the AWW is calculated using "the usual wage that the employer pays a similar employee for similar services." Section 408.041(b)(1); Rule 128.3(f). If neither of the foregoing methods can "reasonably be applied," the AWW is determined "by any method that the [Texas Workers' Compensation Commission] considers fair, just, and reasonable to all parties and consistent with the methods established under [the 1989 Act]." Section 408.041(c); Rule 128.3(g).

In the present case, the claimant and the employer entered into an employment agreement on July 11, 2000, that stated:

[the claimant] has accepted this date employment with COMPANY to provide services at the Straight Time Rate of \$7.00 per hour and an Overtime Rate of \$____ per hour, effective on the day the [claimant] reports to the designated work facility of Galaxy (hereinafter called CLIENT).

5. [Claimant] will be paid a Per Diem allowance to a maximum of \$480.00 per week provided that the [claimant] meets the eligibility requirements as set forth in a Per Diem Certification form executed by the [claimant] in connection with the [claimant's] employment thereunder. [Claimant] must work a full workweek (40 hours or more) to qualify for the full per diem payment. Should [claimant] work less than a full workweek, the Per Diem allowance will be prorated at \$12.00 per hour to the weekly maximum

payment. In the event of a residence change during this assignment, [claimant] shall notify the Company of the new address and accept, if applicable, a Per Diem allowance adjustment.

The carrier argues that the claimant's residence was not sufficient to entitle him to the per diem since his residence was 50 miles from the place of employment. The Certificate of Permanent Residence states that:

Residence is one of the factors used in our policy to determine whether per diem paid to a contract employee is subject to federal and state withholding. Generally, we will not treat per diem as taxable income subject to federal and state withholding as long as the contract employee has been on the job less than one year and permanent residence is not in the same local as the assigned work facility. After one year, per diem will be reported as taxable income and the required federal and state withholdings will be made.

The employer's program administrator testified that per diem eligibility required that the employee reside 50 miles from the place of employment. The hearing officer noted that there was no written documentation offered to support the carrier's contention that per diem eligibility required residence to be 50 miles from the employment.

The hearing officer comments that "the written employment contract in this case is controlling. It is clear the claimant was not receiving the additional \$12.00 per hour to use as a lodging expense but was remuneration for personal service." The definition of "wages" in Section 401.011(43) includes all forms of remuneration payable for a given period to an employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and any other advantage that can be estimated in money that the employee receives from the employer as part of the employee's remuneration. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 128.1(b) and (c) (Rules 128.1(b) and (c)) provide as follows:

- (b) An employee's wage, for the purpose of calculating the [AWW] shall include every form of remuneration paid for the period of computation of [AWW] to the employee for personal services. An employee's wage includes, but is not limited to:
 - (1) amounts paid to the employee by the employer for time off such as holidays, vacation, and sick leave;
 - (2) the market value of any other advantage provided by an employer as remuneration for the employee's services that the employer does not continue to provide, including but not limited to meals, lodging, clothing, laundry, and fuel; and
 - (3) health care premiums paid by the employer.

- (c) An employee's wage, for the purpose of calculating the [AWW], shall not include:
 - (1) payments made by an employer to reimburse the employee for the use of the employee's equipment or for paying helpers; or
 - (2) the market value of any non-pecuniary advantage that the employer continues to provide after the date of injury.

The hearing officer commented that the “[s]ince the wage statement does not include the additional \$12.00 per hour, the similar employee method to determine wages will not be used and, a fair, just and reasonable method will be used to determine the claimant’s [AWW].” The evidence sufficiently supports the hearing officer’s determination that “a fair, just and reasonable [AWW] is derived by multiplying 641.91 hours by \$7.00 [\$4,493.37] and adding the weekly “per diem” amount earned for 13 weeks by another employee in the amount of \$6,102.00 to equal \$10,595.37 [\$4,493.37 + 6,102.00] for an [AWW] of \$815.03.” We have reviewed the complained-of determinations and we conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we affirm the hearing officer’s determination that the claimant’s AWW is \$815.03.

The true corporate name of the insurance carrier is **TRANSPORTATION INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Roy L. Warren
Appeals Judge